



May 09, 2014

National Freedom of Information Office  
US EPA, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, N.W. (2822T)  
Washington, DC 20460

*Submitted electronically to: [foia\\_hq@epa.gov](mailto:foia_hq@epa.gov).*

**Re: Appeal of Denial of Fee Waiver - Trout Unlimited FOIA Request No. EPA-R10-2014-005091.**

Dear Mr. Gottesman:

On behalf of Trout Unlimited (TU), I write to appeal the EPA's denial of TU's request for a waiver of fees associated with TU's March 27, 2014 request for information under the Freedom of Information Act (FOIA) (EPA-R10-2014-00509).

### **I. Background**

On March 27, 2014, Trout Unlimited properly submitted a request for information to the U.S. Environmental Protection Agency (EPA) pursuant to the Freedom of Information Act (FOIA) 5 U.S.C. 522.<sup>1</sup> In that March request, TU requested a waiver of fees pursuant to 5 U.S.C. 522(a)(4)(a)(iii) and consistent with the fee waiver criteria located at 40 C.F.R. 2.107.

On April 11, 2014, EPA issued a letter denying TU's fee waiver request based on a failure to demonstrate "how the release of information will contribute significantly to the public understanding of government operations or activities."<sup>2</sup> In its letter, EPA instructed: "should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulation, located at 40 C.F.R. 2.107(1) in your appeal."<sup>3</sup>

In support of this appeal, TU provides a discussion of these factors below.

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<sup>1</sup> EPA-R10-2014-005091

<sup>2</sup> Fee Request Denial Letter from Larry Gottesman, EPA National FOIA Officer, to Trout Unlimited, dated April 11, 2014.

<sup>3</sup> Id.

## **II. Argument**

### **A. Trout Unlimited's Fee Waiver Request Meets the Established Waiver Criteria in 40 CFR 2.107(1) and Should Be Granted.**

The Freedom of Information Act section 522(a)(4)(a)(iii) and EPA regulations at 40 C.F.R. 2.107(1) provide that EPA may waive or reduce fees where disclosure of the requested information is (1) in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) the information is not primarily in the commercial interest of the requester.

#### ***1. The information requested by Trout Unlimited is likely to contribute significantly to public understanding of the operations or activities of the government.***

The information requested by Trout Unlimited is likely to contribute significantly to public understanding of the operations or activities of the government. In determining whether information requests meet this public interest test, the EPA applies four factors. Those factors - along with a description of the manner in which Trout Unlimited's March 27<sup>th</sup> request for information satisfies these four factors - are outlined below:

**Factor 1.** The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

The March 2014 FOIA request of Trout Unlimited is limited to identifiable activities or operations of the EPA and its employees, contractors or subcontractors. Specifically, Trout Unlimited requests records of communications related to agency activity and operations connected with potential mining development in the Bristol Bay Watershed, application or use of regulatory provisions in the Clean Water Act Section 404(c), the Bristol Bay Watershed Assessment and associated activities. The subject of the requested records clearly and directly concerns identifiable operations or activities of the EPA by focusing on records of communications and meetings which will provide a better public understanding of action, decision-making, or engagement by the EPA related to management of resources in the Bristol Bay Watershed.

**Factor 2.** The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to

contribute to such understanding when nothing new would be added to the public's understanding.

Disclosure of the requested information will contribute to improve the public's understanding of EPA processes and deliberations. The information requested by Trout Unlimited is intended to provide a greater understanding of the range of communications received by the EPA related to agency's involvement and activities in the Bristol Bay Watershed – specifically related to potential development of the proposed Pebble Mine and EPA use of protective measures under the Clean Water Act. We request these documents with the belief and expectation that the information will shed direct light on how well the agency and its programs work in accomplishing its central resource protection mission – specifically related to activities and evaluations in the Bristol Bay Watershed.

**Factor 3.** The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

As noted above, disclosure of the requested information will contribute to the public's understanding of EPA actions. The information requested by Trout Unlimited is intended to provide a greater understanding of the range of communications received by the EPA related to agency's involvement and activities in the Bristol Bay Watershed – specifically related to potential development of the proposed Pebble Mine and EPA use of protective measures under the Clean Water Act.

Trout Unlimited has the intent and the demonstrated capability to effectively disseminate the acquired information to a broad segment of the public. Information will be disseminated through one or more of the following methods:

- Release of information to the news media;
- Posting information on the Trout Unlimited web page ([www.tu.org](http://www.tu.org)), which draws approximately 17,000 unique visitors each month;
- Updates and information through TU and partner affiliated social networks – including Facebook and other social media sites;
- Circulation of information through email networks and listserves and through outreach to TU's state-based, regional and national membership contacts (more than 150,000 members nation-wide);
- Publication of information in TU's quarterly magazine, Trout, which is distributed to several thousand organizational members and businesses across the country;
- Communication, distribution and collaborative review to various partner organizations, State and Federal agencies, policy-makers, legislators and other interested parties.

Through TU's ongoing engagement and focus on issues related to the Bristol Bay Watershed, our organization plays an important role in informing the public about resource protection and use in this watershed. TU has several consistently reliable and effective methods of distributing information and a dedicated following of interested members of the public. The requested disclosure will contribute to the understanding of a reasonably broad audience of persons both within Trout Unlimited's membership and the public more broadly who are interested in the Bristol Bay Watershed, potential mining development within or connected to that watershed, and the role and activities of the EPA related to this subject.

**Factor 4.** The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced significantly by the disclosure. The FOI Office will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

The information requested by Trout Unlimited will provide a significant amount of insight that is currently not available to the public related to the range and nature of communications received or initiated by the EPA related to resource management in the Bristol Bay Watershed, a topic that is of immense importance and interest to a broad range of the public. This will be incredibly valuable to educate the public about the range of interests, communications and concerns contained in the requested communications and to help inform a more complete picture of agency activity and decision-making.

***2. The information requested by Trout Unlimited is not primarily in the commercial interest of Trout Unlimited.***

In determining whether information requests meet this public interest test, the EPA applies two factors. Those factors, along with a description of the manner in which Trout Unlimited's Request for Information satisfies these factors, are outlined below:

**Factor 1.** The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. The FOI Office will consider any commercial interest of the requester or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters will be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

This request is not in the interest of - and disclosure will not serve - a commercial interest of Trout Unlimited. Similarly, Trout Unlimited does not request this information on behalf of any other party with commercial interest. Trout Unlimited is a nonprofit,

nonpartisan public interest organization dedicated to the protection and restoration of our nation's coldwater fishery resources. Our organization is interested in ensuring that public agencies uphold the public trust through responsible management of our nation's resources. Trout Unlimited is designated as a tax-exempt organization under section 501(c)(3) of the Internal Revenue code.

**Factor 2.** The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. FOI Offices ordinarily will presume that when a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

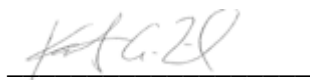
Trout Unlimited has no identified commercial interest that would be furthered by the requested disclosure. As such, this second factor – balancing commercial interest compared to public interest – is not applicable. With no commercial interest at hand in this request for information, the public interest is de facto greater in magnitude than that of any commercial interest in disclosure.

### **III. Conclusion**

Trout Unlimited's request for information is based on its effort to educate the public – including more than 150,000 TU members – along with state and federal regulators and the interested public at large on matters related to government operations, specifically actions related to the EPA's management and application of its Clean Water Act authority in connection with the waters of Bristol Bay, Alaska and the proposed Pebble Mine. As described above, Trout Unlimited's request for information meets the criteria outlined in 40 C.F.R. 2.107(1) and a waiver of fees should be granted in connection with that request. We request that you grant our request of fees related to this request.

Thank you for your attention to this request.

Sincerely,



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## **Attachment A**

### **Fee Waiver Request Excerpted From Trout Unlimited's March 27, 2014 Request for Information.**

Trout Unlimited requests a waiver of fees associated with this request. Under FOIA,

[d]ocuments shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.<sup>4</sup>

If for some reason, the fee waiver request is denied, while reserving all rights to appeal such a decision, we are willing to pay a reasonable fee not to exceed \$500 to cover the cost of duplication and delivery of the requested materials. If you estimate the costs of responding to this request will exceed \$500, please contact Tim Bristol or Kate Miller (contact information provided at the end of this letter). In the event that your agency denies a fee waiver, please send a written explanation for the denial.

Trout Unlimited respectfully requests that, as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l), EPA waive all fees in connection with this request, including a waiver of all processing and copying fees described in 5 U.S.C. § 552(a)(4)(A). As explained below, Trout Unlimited's FOIA request satisfies the six factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the broad requirement for fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l).

Trout Unlimited is a national nonprofit organization with more than 150,000 members organized into about 400 chapters across the U.S. - from Maine to California to Alaska. These dedicated grassroots volunteers are matched by a respected staff of lawyers, policy experts and scientists, who work out of more than 30 offices nationwide. These conservation professionals ensure that Trout Unlimited is at the forefront of fisheries restoration work at the local, state and national levels to fulfill our mission to conserve, protect, and restore North American's coldwater fisheries and their watersheds. Trout Unlimited has been involved in the public process for the proposed Pebble Project for the past five years – publishing reports, participating in public hearings, evaluating data, and helping to better inform the public on the process and substantive issues related to the proposed Pebble Project – particularly as related to coldwater fishery concerns. Trout Unlimited has no commercial interest in obtaining the requested information; instead we intend to use the requested information to inform the public, so that the public can meaningfully participate in the EPA's 404(c) process moving forward.

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<sup>4</sup> 5 U.S.C. § 552(a)(4)(iii); *see also* 15 C.F.R. § 4.11(k).

Disclosure of the requested information is in the public interest—as it will: (1) contribute significantly to the public’s understanding of EPA’s operations and activities, and (2) is not in the commercial interest of Trout Unlimited.

1. The requested documents will significantly contribute to the public understanding of the operations and activities of EPA as they relate to the Watershed Assessment.

To determine whether this first requirement is met, EPA considers the following factors: (1) whether the subject of the request concerns identifiable operations or activities of the Federal government; (2) whether the disclosure is “likely to contribute” to an understanding of government activities or operations, i.e., whether the disclosed information is “meaningfully informative about government operations or activities”; (3) whether disclosure of the requested information will contribute to “public understanding” of a “reasonably broad audience of persons interested in the subject”; and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities “as compared to the level of public understanding existing prior to the disclosure.” 40 C.F.R. § 2.107(l)(2)(i)-(iv).

First, the subject matter of the requested records directly concerns “the operations or activities of the government.” 40 C.F.R. § 2.107(l)(2)(i). There is a “direct and clear” connection between the subject of this request and activities of the government. *Id.* The requested records concern “identifiable operations” of the government, such as: EPA’s scientific development of the Watershed Assessment over a four year period, EPA’s management of the peer review process, EPA’s treatment and incorporation of public and technical concerns into the final Watershed Assessment document, and EPA meetings with the public, scientists, and government officials and Tribes. Disclosure of these records will shed light on EPA’s process and activities involved in the creation of the Watershed Assessment.

Second, the requested records contain information that is “likely to contribute” to an understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(ii). The requested records are indeed “meaningfully informative about government operations or activities.” *Id.* These records contain substantial information about EPA’s four year-long scientific and public process leading to the creation of the final Watershed Assessment. Many of these documents are not publicly available and may only be obtained via a FOIA request. Furthermore, the disclosure of the requested information cannot be considered “already ... in the public domain, in either a duplicative or substantially identical form [as to] not be likely to contribute to such understanding when nothing new would be added to the public’s understanding.” 40 C.F.R. § 2.107(l)(2)(ii). Although some of the requested records have been sought and obtained by other parties via FOIA, the complete results of those FOIA requests have not been distributed to the public. The public’s understanding of EPA’s operations and activities during development of the Watershed Assessment will be greatly enhanced through release of this information to

Trout Unlimited, as Trout Unlimited intends to use this information to contribute to the public's understanding.

Third, disclosure of the requested records will contribute to "public understanding" of a "reasonably broad audience of persons interested in the subject." 40 C.F.R. § 2.107(l)(2)(iii). Trout Unlimited has a longstanding interest and experience of informing public understanding throughout EPA's development of the Watershed Assessment. With the requested information, Trout Unlimited seeks to further its role to inform the public about EPA's operations and activities as they relate to the Watershed Assessment. It is especially important, in light of the highly-publicized nature of EPA's operations and activities here, that disclosure of the requested information be presented to a "broad audience of persons interested in the subject." *Id.* Additionally, Trout Unlimited unquestionably has the "expertise in the subject area" and "ability and intention to effectively convey information to the public." *Id.* With the requested records, Trout Unlimited intends to provide the requested information to the public as well as appropriate members of State and Federal Government and their relevant committees. Information will be disseminated to these individuals and entities, as appropriate, through one or more of the following methods:

- Release of information to the news media;
- Posting information on the Trout Unlimited web page ([www.tu.org](http://www.tu.org)), which draws approximately 17,000 unique visitors each month; and
- Circulation of information through email and other outreach to our state-based, regional and national membership as well as to relevant partner organizations and other interested parties.

Fourth, disclosure of the requested records will likely to contribute "significantly" to public understanding of government operations or activities "as compared to the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(l)(2)(iv). During the nearly four years EPA has taken to develop the Watershed Assessment, EPA's operations and activities have been discussed extensively in local and national media, and notably some discussions have been tailored to misinform and reduce confidence in EPA's activities. Dissemination of misleading and incomplete information obtained via other parties' FOIA requests has led to decreased public understanding of the Watershed Assessment and EPA's scientific and public processes. Thereby, disclosure of the requested records to Trout Unlimited and Trout Unlimited's dissemination of this information in a comprehensive manner will "significantly" increase the public's present understanding, clarify any on-going misconceptions, and reduce public confusion regarding EPA's activities and operations.

## 2. Trout Unlimited has no commercial interest in the disclosure of the information.

To determine whether this second requirement is met, the following factors are considered: (1) whether the requester has a commercial interest that would be furthered by the requested disclosure; and (2) whether any identified commercial interest of the



requester is sufficiently large, in comparison with the public interest in disclosure, that would make the disclosure “primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(3)(i)-(ii).

First, Trout Unlimited has no commercial interests that would be furthered by this FOIA request and Trout Unlimited’s primary interest in this FOIA request is in no way commercial. Trout Unlimited is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, and as such has no commercial interest. Second, as discussed above, it is clear that the disclosure of the requested information is in the public interest. The requested information will contribute significantly to the public’s understanding of the proposed Pebble Project, EPA’s Watershed Assessment, and EPA’s activities and operations. Trout Unlimited will use the requested information to increase public understanding of the operations and activities of EPA as they relate to the proposed Pebble Project.